

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2005-83-A

In the Matter of:)	
)	
Public Service Commission of South)	DUKE ENERGY CAROLINAS,
Carolina - Administrative and Procedural)	LLC AND DUKE ENERGY
Matters)	PROGRESS, LLC'S PETITION
)	FOR RECONSIDERATION OF
)	ORDER NO. 2021-57
)	
)	

Pursuant to S.C. Code Ann. § 58-27-2150 and S.C. Code Ann. Regs. 103-825(A)(4), Duke Energy Carolinas, LLC (“DEC”) and Duke Energy Progress, LLC (“DEP”) (DEC and DEP are jointly referred to as the “Companies”) respectfully request that the Public Service Commission of South Carolina (the “Commission”) reconsider Order No. 2021-57 issued in Docket No. 2005-83-A on January 29, 2021 and served on the parties to this docket on February 1, 2021. The Order establishes a procedural schedule for the Companies’ future electric fuel adjustment proceedings.

Prior to issuance of a final order, the Companies filed a petition for reconsideration of the procedural schedule on December 16, 2020, which the Commission denied via directive on December 30, 2020. Now that a final order has been issued, the Companies are formally requesting reconsideration and have incorporated many of the same arguments that were not addressed in Order No. 2021-57. The Companies believe that the procedural schedule approved by the Commission, which provides either zero (0) business days or one (1) business day between the filing and service of other parties’ surrebuttal testimony and the hearing, will compromise the procedural fairness of the proceedings and violate the Companies’ due process rights.

The Companies request that the procedural schedule for DEC and DEP's annual fuel proceedings be modified to extend the time between the deadline for submission of surrebuttal testimony and the date of the hearing to provide the Companies with sufficient time to provide a meaningful response to any surrebuttal testimony that might be filed in these dockets, as the time afforded by the schedule is inconsistent with due process and the Commission's own rules. The Companies also respectfully request that the Commission address how two or three calendar days (or zero or one business days) between the filing of surrebuttal testimony and the start of the evidentiary hearing comports with the Commission's Rules of Practice and Procedure, as required by S.C. Code Ann. § 58-3-250.¹ *See* S.C. Code Ann. Regs. 103-829 (requiring, as a general rule, that motions be reduced to writing and filed at least ten days prior to commencement of a hearing) and 103-833 (providing that, as a general rule, discovery shall not be served less than ten days prior to a hearing).

BACKGROUND

On July 8, 2020, the Commission issued Order No. 2020-474, which instructed Commission Staff to establish a discussion group to discuss the possible modification of the procedural schedules of current fuel case procedures, including consideration of: 1) additional time to conduct discovery; 2) additional time between the filing of utility direct testimony and the filing of direct testimony by intervenors and the Office of Regulatory Staff ("ORS"); 3) additional time between filing of rebuttal and surrebuttal testimony; 4) access to data earlier in the process upon filing of discovery by parties; 5) additional time after the hearing for the Commission to consider evidence and issue its order; and 6) other schedule modifications.

¹ S.C. Code Ann. § 58-3-250 provides that all final orders of the Commission "must be sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceedings" and must include "(1) findings and conclusions, and the reasons or bases therefor, upon all the material issues of fact or law presented in the record; and (2) the appropriate rule, order, sanction, relief, or statement of denial thereof."

On July 15, 2020, the Clerk's Office issued the Notice of Virtual Forum scheduling a virtual forum to discuss the items described in Commission Order No. 2020-474 on August 25, 2020. Interested parties were instructed to file their written comments and notify the Commission of their intention to participate by no later than August 19, 2020. ORS, Dominion Energy South Carolina, Inc. ("DESC"), DEC, DEP, Nucor Steel – South Carolina ("Nucor"), and Southern Alliance for Clean Energy/South Carolina Coastal Conservation League ("SACE/CCL") timely filed written comments and notified the Commission of their intention to participate in the virtual forum.

In other cases, including DEC and DEP's 2020 fuel proceedings, SACE/CCL have suggested extending the timeframe between when the utility must file its direct testimony and when intervenors must file direct testimony, which precipitated the Commission's original request for comments in this docket. However, as explained in the Companies' comments filed in this docket on August 19, 2020, SACE/CCL's argument that it lacked sufficient time to prepare its direct testimony was based on a mischaracterization of the actual discovery timeline in DEP's 2020 fuel proceeding in Docket No. 2020-1-E. In that case, SACE/CCL witness Gregory Lander represented that there was insufficient time to conduct discovery based upon when DEP filed its direct testimony (April 27, 2020). However, SACE/CCL propounded its only substantive set of discovery on DEP weeks prior to that date, on April 10, 2020, and DEP provided complete responses weeks before SACE/CCL's own testimony was due.² SACE/CCL's argument, therefore—that the testimony filing deadlines restrict intervenors' ability to propound discovery—is misleading, and is contradicted by the fact that it had propounded its only set of substantive

² DEP provided responses to SACE/CCL's first set of data requests by May 4, 2020. SACE/CCL sent a follow-up discovery request on May 3, 2020 to correct an error in its previously submitted request, and DEP provided its response on May 19, 2020.

discovery well before DEP's direct testimony filing deadline. Other parties to the fuel proceedings have multiple, ample opportunities to learn about the Companies' fuel cases. For more than a decade, the Companies have filed—and continue to file—monthly reports in Docket Nos. 1989-9-E and 2006-176-E that detail their monthly fuel costs and power plant performance information, the two pillars of a utility's fuel case. These reports are publicly available and provide dozens of pages of data and information that present a preview of the fuel case well in advance of the Companies' direct testimony filing deadlines. Additionally, pursuant to stipulations in prior fuel cases, the Companies also provide ORS with forecasts of the expected fuel factor to be set at their annual fuel proceedings based upon their historical (over)/under-recovery to date and the Companies' forecast of prices for fuel required for generation of electricity. At the virtual forum, the Companies offered to provide this information—which provides an in-depth preview of the Companies' fuel cases—to other interested parties, including SACE/CCL, on an ongoing basis. At the virtual forum, the Companies reiterated their position that maintaining the existing procedural schedules in the annual fuel proceedings would be preferred.

On September 8, 2020, a proposed procedural schedule was distributed to the parties by a Commission staff attorney by email, with a request for comments on the same by no later than September 14, 2020. The proposed procedural schedule reduced the amount of time between the filing of surrebuttal testimony and the start of the evidentiary hearing from what had traditionally been a period of approximately one week to either zero (0) business days or one (1) business day. For example, in DEP's 2019 annual fuel proceeding, surrebuttal testimony was due on May 31, 2019 and the hearing began on June 6, 2019. That allowed DEP six days to review the filed surrebuttal testimony, prepare any responses or motions necessary, and ready any cross-examination necessary prior to the hearing. That time frame was already tight, and shorter than

the 10-day window contemplated by the Commission's rules requiring motions on pleadings be filed 10 days prior to hearing. The Companies argued that time frame should not be shortened. Instead, the Commission further shrunk that window in the 2021 annual fuel proceeding, only allowing DEP two calendar days (one business day) to review surrebuttal testimony. The notion that surrebuttal testimony would be filed only one business day prior to hearing forecloses the opportunity to have discovery or to file meaningful motions to strike or other procedural motions on it and unfairly prejudices the Companies at the hearing. The proposed schedule similarly reduced the timeline for DEC and carries similar defects.

ORS, DESC, DEC, DEP, Nucor, and SACE/CCL all filed comments on September 14, 2020. In their comments, the Companies noted that they were unable to agree to changes in the schedule that would effectively eliminate any meaningful time between the filing of surrebuttal testimony and the start of the evidentiary hearing. The Companies further expressed concerns that the short time frame set forth in the proposed schedule could compromise procedural fairness of the proceedings and the Companies' due process rights and would be inconsistent with the Commission's regulations and South Carolina law.

After receiving the written comments filed by the parties, the Commission issued a directive on October 28, 2020. The Directive granted intervenors an additional week to file their direct testimony and approved the extremely short timeframe between the filing of surrebuttal testimony and the start of the evidentiary hearing, as set forth below. This additional time was granted to intervenors at the expense of the Companies' ability to assess surrebuttal testimony or seek discovery on it, make motions on it (which under Commission rules are supposed to occur 10 days prior to hearing), and adequately prepare for hearing in a contested matter, if contested.

<u>2021</u>	Notice Issuance	Company Direct Testimony	All Other Parties' Direct Testimony	Rebuttal Testimony	Surrebuttal Testimony	Hearing	Proposed Orders	Rates Effective
DEP	2 nd week of December	4/27/2021	5/25/2021	6/1/2021	6/8/2021	6/10/2021	6/17/2021	7/1/2021
DEC	End of March	7/30/2021	8/27/2021	9/3/2021	9/10/2021	9/13/2021; 9/14/2021	9/21/2021	10/1/2021

<u>2022</u>	Notice Issuance	Company Direct Testimony	All Other Parties' Direct Testimony	Rebuttal Testimony	Surrebuttal Testimony	Hearing	Proposed Orders	Rates Effective
DEP	2 nd week of December	4/27/2021	5/25/2021	6/1/2021	6/8/2021	6/10/2021	6/17/2021	7/1/2021
DEC	End of March	7/29/2021	8/26/2021	9/2/2021	9/9/2021	9/12/2021; 9/13/2021	9/20/2021	10/1/2021

On January 29, 2021, the Commission issued Order No. 2021-57 adopting the schedule filed in the Docket Management System on September 8, 2020 and instructing the Clerk to use these time periods between prefiled testimony, hearing, and proposed orders for the years following 2021 and 2022. Order No. 2021-57 was added to the Docket Management System on February 1, 2021 and served on the parties at that time.

GROUND FOR RECONSIDERATION

The Companies believe that the procedural schedule approved by the Commission, which provides either zero (0) business days or one (1) business day between the filing and service of other parties' surrebuttal testimony and the hearing, will compromise the procedural fairness of the proceedings and violate the Companies' due process rights. As the Companies have previously explained in their comments and at the virtual forum, the Companies recognize the importance of a robust discovery process and work diligently to provide complete and timely responses to data

requests from ORS and other intervenors. The Commission's decision to grant intervenors an additional seven (7) days to file direct testimony, at the expense of the Companies' time to review and assess surrebuttal testimony and adequately prepare for a hearing, is not the appropriate remedy for the issue at hand. Instead of reducing the amount of time between the surrebuttal testimony deadline and the hearing, intervenors should simply propound timely discovery to the Companies, in accordance with the Commission's rules.

I. Procedural Fairness

Procedural fairness requires sufficient time between the filing of intervenors' surrebuttal testimony and the hearing, and the current procedural schedule significantly compromises such fairness. While the Companies would have either zero (0) or one (1) business day between the filing and service of surrebuttal testimony and the hearing, other parties would have more than a week to review and evaluate the Companies' rebuttal testimony ahead of the hearing, and more than six weeks to review and evaluate the Companies' direct testimony.

S.C. Code Ann. § 58-3-140(D) states that "[t]he commission must promulgate regulations to require the direct testimony of witnesses appearing on behalf of utilities and of witnesses appearing on behalf of persons having formal intervenor status, such testimony to be reduced to writing and prefiled with the commission in advance of any hearing." Permitting testimony to be pre-filed the business day prior to the hearing is not compliant with S.C. Code Ann. § 58-3-140(D) and is inconsistent with the very purpose of pre-filing testimony. As the Commission has previously found, the purpose of pre-filing testimony is to provide notice of the issues, accord fairness to all parties, and allow for a more orderly and efficient hearing. Order No. 1996-259-WS at 2, Docket No. 1996-629 (Sept. 10, 1996); see also S.C. Code Ann. Regs. 103-802 ("[The Commission's regulations concerning Practice and Procedure] are intended to insure that all

parties participating in proceedings before the Commission will be accorded the procedural fairness to which they are entitled by law.”). Permitting surrebuttal testimony to be filed a day or two before the hearing would not serve these goals and would severely compromise the procedural fairness of the proceeding in contravention of S.C. Code Ann. Regs. 103-802 and South Carolina case law. *See, e.g., Ross v. Med. Univ. of South Carolina*, 317 S.C. 377, 381, 453 S.E.2d 880, 883 (1994) (“[A] reviewing court has the duty to examine the procedural methods employed at an administrative hearing to ensure that a fair and impartial procedure was used.”). In *Utilities Services v. South Carolina Public Service Commission*, 392 S.C. 96, 708 S.E.2d 755 (2011) the Supreme Court reversed the Commission because the utility was not given a sufficient opportunity to respond to evidence submitted at public hearings: “Consistent with its obligation to provide Utility an opportunity to achieve a reasonable return, the PSC was obligated to accord Utility a meaningful opportunity to rebut the evidence presented in opposition to its proposed rates.” *Id.*, p. 108, citing *Bluefield Waterworks v. Public Service Commission of West Virginia*, 262 U.S. 679 (1923); *Southern Bell Telephone v. Public Service Commission of South Carolina*, 270 S.C. 590, 244 S.E.2d 278 (1978). The Companies believe that shortening the time to one or no days between intervenors filing surrebuttal and the hearing—thereby limiting utilities’ ability to review and respond to surrebuttal testimony—fails to afford a fair and impartial procedure.

The procedural schedule set forth in Order No. 2021-57 does not provide the Companies with sufficient time to review surrebuttal testimony and file necessary motions, much less to meet the deadline for motions required by the Commission’s regulations.³ As litigation before the

³ The Companies need to be provided with sufficient time to file motions for Commission consideration on any issues raised in surrebuttal testimony. S.C. Code Ann. Regs. 103-829 contemplates a 10-day window for motions and for any motions to compel that might be required on discovery arising from the surrebuttal testimony.

Commission becomes increasingly more complex, the procedural safeguards and timing contemplated by the rules must be preserved.

II. Due Process

Due process requires that the entity in jeopardy of loss—in this case, a utility and its recovery of fuel costs—be given adequate “notice of the case against him and opportunity to meet it.” *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976). The South Carolina Supreme Court has held that Article I, Section 22 of the South Carolina Constitution applies the fundamental requirements of due process to administrative proceedings, including, “notice, an opportunity to be heard in a meaningful way and judicial review.” *Kurschner v. City of Camden Planning Comm’n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). Moreover, in a quasi-judicial or adjudicatory proceeding, “the substantial rights of the parties must be preserved.” *Spartanburg v. Parris*, 251 S.C. 187, 190, 161 S.E.2d 228, 229 (1968).

Due process demands that the Companies be afforded notice and a meaningful opportunity to respond to the testimony presented by other parties. Utilities have a right to understand not only the substance of surrebuttal testimony, but also the underlying basis for the positions articulated therein. The current procedural schedule would significantly restrict the Companies’ ability to review and understand the surrebuttal testimony itself and would prohibit them from obtaining discovery regarding its underlying support and respond to the case brought by the intervenors.

Pursuant to the procedural schedule approved by the Commission for DEC’s 2021 fuel proceeding, surrebuttal testimony is due to be filed by Friday, September 10, and the hearing is set to begin the following Monday, September 13, leaving zero (0) business days between the testimony deadline and the hearing. For DEP’s 2021 fuel proceeding, surrebuttal testimony is due to be filed on Tuesday, June 8, and the hearing is scheduled to begin on Thursday, June 10. When

considering that S.C. Code Ann. Regs. 103-817.1, which governs electronic filing and service, provides that “[a] document transmitted and received by the E-Filing System on or before 11:59:59 p.m., Eastern Standard Time, shall be considered filed with the Commission on that date, provided it is subsequently accepted by the Commission,” DEP is left with a single business day to review and evaluate surrebuttal testimony filed by other parties. A utility receiving another party’s case against it in a fuel proceeding only one or two business days prior to the hearing would compromise the fundamental constitutional requirements of due process and be inconsistent with the Commission’s own rules.

CONCLUSION

The Companies believe that fairness, due process, and the full expression of the Commission’s own rules prohibit the schedule recently approved for DEC and DEP, and the Companies also believe appellate risk is indicated by such unnecessarily short deadlines. Based on the foregoing, the Companies respectfully request that the Commission reconsider the procedural schedule set forth in Order No. 2021-57 issued in Docket No. 2005-83-A and issue a new procedural schedule providing at least seven (7) days between the surrebuttal filing deadline and the start date of the evidentiary hearing.

Dated this 11th day of February, 2021.

s/Katie M. Brown

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